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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

ALFA-LAVAL FOOD & DAIRY CO., and ALFA-LAVAL CREDIT AB,

Petitioners,

v.

BRITZ, INC., HELM CONCENTRATES, INC., and HELM TOMATOES, INC.,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of California

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, in a case governed by the Federal Arbitration Act, a court should enforce a contract providing that the American Arbitration Association shall conclusively decide whether to disqualify an arbitrator for an alleged failure to disclose circumstances that could affect the arbitrator's impartiality.

2. Whether when deciding a petition to vacate an arbitration award pursuant to the Federal Arbitration Act, a court should defer to an arbitrating body's prior decision not to disqualify an arbitrator for an alleged failure to disclose circumstances that could affect the arbitrator's impartiality, when the parties contractually agreed that the arbitrating body's decision on that issue would be "conclusive."

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PETITION FOR WRIT OF CERTIORARI

CITATIONS TO OPINIONS BELOW

Petitioners Alfa-Laval Food and Dairy Company and Alfa-Laval Credit AB (collectively "Alfa-Laval" or "Petitioners") respectfully pray the Court issue a writ of certiorari to review the judgment and order of the Supreme Court of the State of California entered on August 10, 1995, denying review of the judgment and opinion of the Court of Appeal of California, Fifth Appellate District entered on May 8, 1995 and modified on June 6, 1995.[1] The order denying review by the Supreme Court of the State of California is not reported, but is reprinted in full in the appendix hereto at App. 29. The decision of the Court of Appeal of California, Fifth Appellate District is reported at 34 Cal. App. 4th 1084, 40 Cal. Rptr. 2d 700 (Cal. Ct. App. 1995), and is reprinted in full in the appendix hereto at App. 1-App. 28.

GROUNDS FOR JURISDICTION

On August 10, 1995, the Supreme Court of the State of California issued an order denying review of the judgment and opinion of the Court of Appeal of California. The court of appeal had reversed the California Superior Court's order confirming an arbitrator's award in favor of Alfa-Laval and denying Britz, Inc., Helm Concentrates, Inc. and Helm Tomatoes, Inc.'s motion to vacate the award on the basis of the arbitrator's alleged failure to disclose circumstances bearing on the appearance of his impartial-

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[1] Tetra Laval U.S. Holdings, Inc. a Delaware corporation, is the parent company of Petitioners Alfa-Laval Food and Dairy Company and Alfa-Laval Credit AB; there are no subsidiaries of Petitioners which are not wholly owned. This information is provided pursuant to Supreme Court Rule 29.6.

ity. Both the superior court and court of appeal concluded their decisions were "governed by the Federal Arbitration Act." App. 6.

This Court has jurisdiction to review the decision below in that it concerns Petitioners' "[r]ight[s] . . . claimed under the . . . statutes of . . . the United States." 28 U.S.C. § 1257(a). In violation of Sections 2 and 4 of the Federal Arbitration Act, the decision below eviscerates an arbitration clause in a contract involving interstate commerce. 9 U.S.C. §§ 2, 4. The California court "has decided an important question of federal law which has not been, but should be, settled by this Court," and "has decided a federal question in a way that conflicts with applicable decisions of this Court." S. Ct. R. 10(c).

STATUTES INVOLVED

Section 2 of the Federal Arbitration Act (the "Act"), concerning validity, irrevocability, and enforcement of agreements to arbitrate, states:

> A written provision in any maritime transaction or ***a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction***, or the refusal to perform the whole or any part thereof, or any agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, ***shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.***

9 U.S.C. § 2 (emphasis added).

Section 4 of the Act establishes a rule of allowing parties to agree upon the manner in which they arbitrate, and states in relevant part:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that ***such arbitration proceed in a manner provided for in such agreement.***

9 U.S.C. § 4 (emphasis added).

STATEMENT OF THE CASE

In 1989, Respondents, Britz, Inc., Helm Concentrates, Inc., and Helm Tomatoes, Inc. (collectively "Britz" or "Respondents") contracted with Alfa-Laval to buy and lease certain machines and equipment necessary for their operation of a tomato paste processing plant in Helm, California. The parties' sale and lease contracts contain a mandatory arbitration provision, which states:

> Any controversy or claim arising out of or relating to these General Conditions of Plant Sales and other documents comprising the agreement between Seller and Purchaser, or the breach thereof, shall be settled by arbitration in accordance with the commercial arbitration rules of the American Arbitration Association, and judgment upon the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

In 1990, disputes arose between the parties concerning the capabilities of the equipment Alfa-Laval provided to Britz under the parties' various contracts. Britz filed suit in California and Alfa-Laval moved to compel arbitration. On November 29, 1990, the California Superior Court of Fresno County, as authorized by the Federal Arbitration Act, ordered the parties to arbitrate their disputes through

the American Arbitration Association (the "AAA") pursuant to the mandatory arbitration clauses in the contracts.[2] The parties agreed to the appointment of a single arbitrator, John E. Peterson, a Fresno attorney. In the arbitration, Britz sought damages in excess of $40,000,000, and Alfa-Laval counterclaimed for more than $1,000,000 in damages.

The parties agreed to bifurcate the arbitration. The liability phase began on January 6, 1992, and testimony lasted for three weeks. On May 22, 1992, the arbitrator issued an interim liability award in favor of Alfa-Laval. Thirty-three days later, Britz asked the arbitrator to disclose any financial or personal interest he had with the law firm that acted as Alfa-Laval's local counsel in the superior court proceedings to compel arbitration, McCormick, Barstow, Sheppard, Wayte & Carruth. The McCormick firm was only peripherally involved in the legal dispute and did not participate in the arbitration. In response to Britz's inquiries, Mr. Peterson disclosed certain referral relationships with the McCormick firm and some expert witness services for McCormick clients. On July 21, 1992 Britz filed an objection to Mr. Peterson's continued service as arbitrator with the AAA pursuant to the parties'

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[2] Application of the Federal Arbitration Act was determined in the first instance by the superior court in November of 1990 when Britz opposed Alfa-Laval's motion to compel arbitration. App. 35 ("The Federal Arbitration Act . . . is applicable to defendant's petition to compel arbitration. . . . All of the transactions involved in the case at bar involved interstate commerce."); *see also* Alfa-Laval reply at App. 52 ("The plaintiffs are correct in stating that the Federal Arbitration Act is applicable to the written provisions in a contract evidencing interstate commerce. They are also correct in stating that this dispute involves interstate commerce."). On appeal, the court below noted "this case is governed by the Federal Arbitration Act." App. 6.

agreed-upon procedures under Rule 19 of the Commercial Arbitration Rules of the American Arbitration Association (AAA Rule 19). Rule 19 provides:

> Any person appointed as neutral arbitrator shall disclose to the AAA any circumstances likely to affect impartiality, including any bias or any financial or personal interest in the result of the arbitration or any past or present relationship with the parties or their representatives. Upon receipt of such information from the arbitrator or another source, the AAA shall communicate the information to the parties and, if it deems it appropriate to do so, to the arbitrator and others. ***Upon objection of a party to the continued service of a neutral arbitrator, the AAA shall determine whether the arbitrator should be disqualified and shall inform the parties of its decision, which shall be conclusive.***

AAA Rule 19 (emphasis added).

On August 4, 1992, after "careful review" of the issue and of the briefs submitted by both sides and "in accordance with Section 19 of the Commercial Arbitration Rules," the AAA denied "the challenge submitted by [Britz] to the Arbitrator's continued service" and reaffirmed his "appointment and continued service on the above-captioned matter." App. 56. On February 4, 1993, prior to the commencement of the damages phase of the arbitration hearings, Britz petitioned the AAA for "reconsideration" of the AAA's August 4, 1992 decision denying Britz's objection to the arbitrator's continued service. On February 18, 1993, the AAA denied Britz's request for reconsideration and again confirmed Mr. Peterson's service as the arbitrator. App. 58.

The evidentiary hearing on damages proceeded, and on March 31, 1993, the arbitrator issued a final award of $587,425 plus costs and attorneys' fees in favor of Alfa-Laval. On May 6, 1993, the arbitrator issued a supplemen-

tal award of $1,412,953.75 for Alfa-Laval's attorneys' fees and $696,747.45 for its costs. Britz petitioned the California Superior Court of Fresno County to vacate the arbitrator's award and argued that the AAA had erred by not disqualifying Mr. Peterson. Alfa-Laval moved to dismiss Britz's petition to vacate and filed a petition to confirm the arbitration award. After a hearing, the superior court "determined AAA's resolution of the conflict issue was a 'plausible interpretation of the law and facts and was rendered with a minimum standard of fair dealing.' " *Britz, Inc. v. Alfa-Laval Food & Dairy Co.*, 34 Cal. App. 4th 1085, 1101, 40 Cal. Rptr. 2d 700, 708 (Cal. Ct. App. 1995). The superior court denied Britz's petition to vacate and confirmed the arbitrator's award in Alfa-Laval's favor. App. 61-62.

The Court of Appeal of California, Fifth Appellate District, reversed and remanded to the trial court for a new hearing. *Britz, Inc. v. Alfa-Laval Food & Dairy Co.*, 34 Cal. App. 4th 1085, 40 Cal. Rptr. 2d 700 (Cal. Ct. App. 1995). The court first noted that the Federal Arbitration Act governs the case. *Id.* at 1094, 40 Cal. Rptr. 2d at 704-05. The court next acknowledged that courts normally review an arbitrator's factual determinations with deference: "[w]hen the parties to a contract agree that a factual determination is to be made by a neutral third party that determination is upheld in the absence of fraud or gross mistake as would necessarily imply bad faith." *Id.* at 1102, 40 Cal. Rptr. 2d at 710 (citing *Aerojet-General Corp. v. American Arbitration Ass'n*, 478 F.2d 248, 252 n.5 (9th Cir. 1973)). But the court failed to recognize that the parties were contractually bound to follow AAA Rule 19 and that the AAA's decision not to disqualify the arbitrator was "conclusive." Instead, the court below held "that a trial court considering a petition to confirm or vacate an arbitration award is required to determine, de

novo, whether the circumstances disclose a reasonable impression of arbitrator bias, when that issue is properly raised by a party to the arbitration." *Id.* at 1103, 40 Cal. Rptr. 2d at 710. The court reasoned that it could not trust the AAA with such a determination because of the AAA's "vested interest" in the decision. *Id.* at 1102-03, 40 Cal. Rptr. 2d at 710.

Alfa-Laval petitioned the Supreme Court of California for review. On August 10, 1995, the Supreme Court of California denied review. App. 29. Petitioners now request that this Court grant a writ of certiorari to determine whether, in a case governed by the Federal Arbitration Act, a trial court should defer to an arbitrating body's decision not to disqualify an arbitrator for an alleged failure to disclose circumstances that could affect the arbitrator's impartiality, when the parties contractually agreed that the arbitrating body's decision on that issue "shall be conclusive."

REASONS FOR GRANTING THE WRIT

This is the first case to involve a considered determination by an appellate court on how to review a decision involving alleged arbitrator bias when that decision was committed by contract to the arbitrating body. The court below, attempting to interpret the Federal Arbitration Act, held that courts must review such decisions by an arbitrating body—in this case the American Arbitration Association—de novo whenever an issue of bias has been raised. The case law upon which the court relied, however, dealt with disputes where the parties had not previously agreed to submit such questions to the arbitrating body. In this case, the parties contractually agreed to, and did in fact, take the arbitrator bias issue to the arbitrating body for a conclusive decision.

The decision below raises significant issues relating generally to the enforcement of arbitration agreements pursuant to the Federal Arbitration Act (9 U.S.C. §§ 1-14) and specifically to this Court's mandate that courts "enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms." *Volt Information Sciences, Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ.*, 489 U.S. 468, 478 (1989) (citation omitted). Despite this clear directive, the Court of Appeal of California refused to enforce the parties' agreement that the AAA's decision whether to disqualify the arbitrator would be "conclusive." Instead, the court set a standard of de novo review by a trial court of each allegation of arbitrator bias. This ruling violates the statutory mandate that arbitration contracts "shall be valid, irrevocable, and enforceable" and that courts shall enforce arbitration contracts so the "arbitration proceed[s] in a manner provided for in such agreement." 9 U.S.C. §§ 2, 4. The decision by the court of appeal to recapture for the courts all issues which bear upon alleged arbitrator bias is an egregious example of the judiciary's jurisdictional jealousy of arbitration, which the Act was enacted to redress (*see* H.R. Rep. No. 96, 68th Cong., 1st Sess. 1-2 (1924); S. Rep. No. 536, 68th Cong., 1st Sess. 2-3 (1924)), and for which this Court has repeatedly admonished lower courts. *See, e.g., Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219-20 (1985).

The decision below conflicts with this Court's directive to enforce arbitration agreements according to their terms, *Volt*, 489 U.S. at 478, and is based upon a misinterpretation of the Federal Arbitration Act. Once the talismanic invocation of bias was made, the court below felt constrained by the Act to conduct a de novo review, effectively to blunt the allegations of bias with a judicial look at a claim which the American Arbitration Association has

twice decided. The mandated judicial review is to be undertaken as if the AAA did not exist, and as if the parties' agreement to AAA Rule 19 has no meaning. As an extension of the law by a respected appellate court, this adoption of de novo judicial review for each allegation of arbitrator bias establishes a hole in the Act to which every dissatisfied litigant may turn when an arbitration goes badly.

The decision below undermines the effective administration of the Act and casts doubt upon the thousands of relationships among businesses and individuals who have incorporated AAA Rules into their arbitration agreements on the premise that arbitration will keep them out of court. AAA Rule 19 provides that the AAA "shall" hear all objections to an arbitrator's continued service based on alleged nondisclosures or evident partiality and shall make a "conclusive" decision whether to disqualify the arbitrator. AAA Rule 19. Thousands of parties depend on the arbitrating body's conclusive resolution of nondisclosure and disqualification issues. These parties execute contracts committing this very decision to the body specified in their agreements. De novo review by trial courts of agreed arbitration issues eviscerates the purpose of the Act—to avoid relitigation of arbitrated issues—and denies the parties the benefit of their bargains.

I.

DE NOVO REVIEW OF THE AAA'S CONCLUSIVE DECISION TO CONFIRM THE ARBITRATOR CONFLICTS WITH THIS COURT'S DIRECTIVE THAT THE FEDERAL ARBITRATION ACT BARS COURTS FROM INTERFERING WITH THE PARTIES' INTENTION TO ARBITRATE.

A. Under the Act, Courts Must Enforce the Parties' Agreements Concerning the Substance and Manner of Arbitration.

The Federal Arbitration Act was enacted principally to ensure "that private agreements to arbitrate are enforced according to their terms." *Volt Information Sciences, Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ.*, 489 U.S. 468, 479 (1989). Prior to the Act, courts often had refused to enforce valid arbitration agreements due to the judiciary's traditional aggression toward arbitration and its jurisdictional jealousy of arbitrators' authority. The House of Representatives Report reflects this concern:

> The need for the law arises from an anachronism of our American law. Some centuries ago, because of the jealousy of the English courts for their own jurisdiction, they refused to enforce specific agreements to arbitrate upon the ground that the courts were thereby ousted from their jurisdiction. This jealousy survived for so long a period that the principle became firmly embedded in the English common law and was adopted with it by the American courts.

H.R. Rep. No. 96, 68th Cong., 1st Sess. 1-2 (1924).

To overcome this jurisdictional jealousy, Congress crafted the Federal Arbitration Act, which precludes courts from interfering with the manner in which parties agree to arbitrate. Section 2 of the Act embodies a "liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to

the contrary." *Moses H. Cone Memorial Hosp. v. Mercury Constr. Co.*, 460 U.S. 1, 24 (1983). Similarly, Section 4 evinces a legislative intent that "arbitration [should] proceed in [the] manner provided for in [the parties'] agreement." 9 U.S.C. § 4. Indeed, the Act's legislative history manifests this respect for the parties' contract to arbitrate. The House of Representatives Report states:

> Arbitration agreements are purely matters of contract, and the effect of the bill is simply to make the contracting party live up to his agreement. He can no longer refuse to perform his contract when it becomes disadvantageous to him. An arbitration agreement is placed upon the same footing as other contracts, where it belongs.

H.R. Rep. No. 96, 68th Cong., 1st Sess. 1 (1924).

This legislative intent to enforce arbitration agreements like all other contracts applies to all aspects of the contract. The parties' agreement determines the substance of and the procedures for the arbitration. This Court's precedent establishes that the judiciary may not interfere with the parties' intent to arbitrate, to submit certain issues to arbitration, or to conduct the arbitration in a designated manner. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *Volt Information Sciences, Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ.*, 489 U.S. 468, 479 (1989) ("Just as [parties] may limit by contract the issues which they will arbitrate . . . so too may they specify by contract the rules under which that arbitration will be conducted.") (citation omitted); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987) (claims under the Securities Exchange Act and RICO are arbitrable) *reh'g denied*, 483 U.S. 1056 (1987); *Southland Corp. v. Keating*, 465 U.S. 1 (1984) (Act preempts state laws voiding arbitration clauses and applies in state

courts); *Prima Print Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967) (claim of fraud in inducement of entire contract arbitrable under broad arbitration clause).

In 1995, the Court issued three opinions holding that lower courts misconstrue the Act when invoking state laws or other concerns to override the parties' contractual terms. *First Options of Chicago, Inc. v. Kaplan*, 115 S. Ct. 1920 (1995); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 115 S. Ct. 1212, 1216 (1995) ("[I]f contracting parties agree to include claims for punitive damages within the issues to be arbitrated, the FAA ensures that their agreement will be enforced according to its terms even if a rule of state law would otherwise exclude such claims from arbitration."); *Allied-Bruce Terminix Cos. v. Dobson*, 115 S. Ct. 834 (1995) (upholding enforceability of arbitration agreement governed by Alabama law, even though an Alabama statute provides that arbitration agreements are unenforceable). In *First Options*, the Court held that an arbitrator may decide the arbitrability of substantive issues if the parties agree that the arbitrator, rather than the court, will do so. "[T]he question 'who has the primary power to decide arbitrability' turns upon what the parties agreed about that matter." *First Options*, 115 S. Ct. at 1923. The Court reached this decision even though courts normally have authority under the Act to determine de novo whether the arbitrator exceeded his or her power. 9 U.S.C. § 10(b).

In the present case, the parties specifically adopted the AAA rules as part of their contract.[3] Britz and Alfa-Laval

[3] AAA Rule 1 states:

> The parties shall be deemed to have made these rules a part of their arbitration agreement whenever they have provided

(Footnote continued on following page)

contractually agreed that either of them could object to the arbitrator's continued service if it believed the arbitrator failed to disclose circumstances likely to affect his impartiality. They also contractually agreed that upon such an objection, the AAA's decision concerning whether to disqualify the arbitrator "shall be conclusive." AAA Rule 19.[4] Thus, in the same way the *First Options* parties

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[3] *continued*

> for arbitration by the American Arbitration Association (hereinafter AAA) or under its Commercial Arbitration Rules. These rules and any amendment of them shall apply in the form obtaining at the time the demand for arbitration or submission agreement is received by the AAA. The parties, by written agreement, may vary the procedures set forth in these rules.

AAA Commercial Arbitration Rule 1; *see also Cellular Radio Corp. v. OKI America, Inc.*, 664 A.2d 357, 358 n.3 (D.C. 1995) ("The rules were expressly incorporated by the parties' contract. [Rule 1.] Hence, Cellular was bound to adhere to them."). In addition, AAA Rule 3 states:

> When parties agree to arbitrate under these rule, or when they provide for arbitration by the AAA and an arbitration is initiated under these rules, they thereby authorize the AAA to administer the arbitration. The authority and duties of the AAA are prescribed in the agreement of the parties and in these rules, and may be carried out through such of the AAA's representatives as it may direct.

AAA Commercial Arbitration Rule 3.

[4] Several courts have specifically recognized a party's right to have the AAA conclusively decide whether to disqualify an arbitrator due to nondisclosure. *York Hannover Holding A.G. v. American Arbitration Ass'n*, No. 92 Civ. 1643 (CSH), 1993 WL 159961, *5 (S.D.N.Y. May 11, 1993) (deference to AAA's conclusive decision under Rule 19 that arbitrator was not biased); *Bernard v. Hemisphere Hotel Management, Inc.*, 450 N.E.2d 1084 (Mass. App. Ct.) (trial court erred in interfering with AAA's decision to remove arbitrator and to allow arbitration to continue), *review denied*, 454 N.E.2d 1276 (Mass. 1983); *Van Syoc v. Walter*, 613 A.2d 490 (N.J. Super. Ct. App. Div. 1992) (affirming deferential review of AAA decision not to disqualify arbitrator), *cert. denied*, 627 A.2d 1136

(Footnote continued on following page)

agreed to submit the issue of arbitrability to arbitration, Britz and Alfa-Laval contractually agreed that disqualification based on nondisclosure would be an arbitrable issue for the AAA's conclusive resolution. Under the Act, a lower court must enforce this contractual term and defer to the AAA's decision on disqualification. To hold otherwise conflicts with this Court's holdings, and disembowels the Federal Arbitration Act.

B. De Novo Review of Agreed Upon Arbitration Issues Contravenes the Federal Arbitration Act's Mandate That Arbitration Proceed in the Manner Provided in the Parties' Agreement.

Under the Act, courts may not interfere with arbitration by refusing to enforce the parties' agreement. Similarly, courts may not nullify the parties' agreement with a de novo review of the arbitrating body's orders, doing through a back door what the Act expressly prohibits them from doing through the front. By invoking a de novo standard of review in cases such as this, courts annul the parties' binding agreement to arbitrate and, necessarily, violate the requirement of Sections 2 and 4 of the Act that courts "rigorously enforce agreements to arbitrate." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985). The lower court's mandated de novo review of the AAA's "conclusive" decision overruling a party's objection to the arbitrator is simply a refusal to enforce the parties' agreement to arbitrate according to the AAA Commercial Arbitration Rules.

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[4] *continued*

(N.J. 1993); *cf. Freeport Constr. Co. v. Star Force, Inc.*, 378 N.E.2d 558, 560 (Ill. App. Ct. 1978) (specifically distinguishing situation where AAA rules did not provide that its determination would be binding).

Addressing what standard of review a trial court should apply to an arbitrator's decision concerning arbitrability, the *First Options* Court began with the general rule that the parties' agreement defines the standard for measuring the degree of judicial intervention into the arbitration process. *First Options*, 115 S. Ct. at 1923. The Court explained:

> If the parties agreed to submit the question itself to arbitration, the court's standard for reviewing the arbitrator's decision about that matter should not differ from the standard courts apply when they review any other matter that parties have agreed to arbitrate. . . . That is to say, the court should give considerable leeway to the arbitrator, setting aside his or her decision only in certain narrow circumstances.

First Options, 115 S. Ct. at 1923 (citations omitted).[5] If the parties did not agree to submit a matter to the entity administrating the arbitration, then the court should decide the matter "just as it would decide any other question that the parties do not submit to arbitration, namely independently." *Id.* at 1924. These two standards flow inexorably from a court's obligation under the Act "to insure that commercial arbitration agreements, like other contracts, are enforced according to their terms, and according to the intentions of the parties." *Id.* at 1925 (internal quotes and citations omitted).

Courts generally use a deferential standard to review decisions by the AAA when the parties agree that the

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[5] *See also George Constr. Co. v. United Brotherhood of Carpenters & Joiners of Am.*, 722 F.2d 1471, 1477 (9th Cir. 1984) ("Moreover, this deferential standard of review applies when the parties have submitted legal questions to the arbitrator 'even if the question is one that is ordinarily for the courts to decide.' ") (citation omitted).

decision will be final or conclusive. In *Aerojet-General Corp. v. American Arbitration Ass'n*, 478 F.2d 248 (9th Cir. 1973), the court ruled that the district court improperly interfered with the AAA's independent decision concerning arbitration venue. The parties' contract provided that any dispute was subject to arbitration in accordance with AAA rules. Pursuant to its rules, the AAA decided that the parties should arbitrate in New York, which decision was affirmed by the Association's Executive Vice President. *Id.* at 249-50. AAA Rule 10 states that such a decision "shall be final and binding." The objecting party filed suit in the district court, which enjoined the arbitration from proceeding in New York pending a trial on the merits. Noting that the " 'correctness' of the arbitrator's ruling is not a proper concern of the reviewing court," the court of appeals reversed the district court. *Id.* at 252. The court found there was no reason for the district court to review independently the AAA's venue decision or to vacate the AAA's decision: there was no partiality by the AAA; the AAA did not exceed its contractual authority; and the decision was not rendered in "manifest disregard of the law." *Id.* The court concluded: "[w]hen the parties to a contract agree that a factual determination is to be made by a neutral third party that determination is upheld in the absence of fraud or gross mistake as would necessarily imply bad faith [by the arbitrating body]." *Id.* at 252 n.5.

In this case, a de novo review of the AAA's "conclusive" decision to confirm the arbitrator similarly interferes with the parties' agreement to arbitrate. By failing to enforce the parties' arbitration contract with regard to the conclusive procedures employed in ruling on an objection to the arbitrator, the court below denies the parties the benefit of their bargain—finality on the issue of disqualification.

> Because the decision to arbitrate grievances evinces the parties' intent to bypass the judicial system and thus avoid potential delays at the trial and appellate levels, arbitral finality is a core component of the parties' agreement to submit to arbitration. Thus, an arbitration decision is final and conclusive because the parties have agreed that it be so. By ensuring that an arbitrator's decision is final and binding, courts simply assure that the parties receive the benefit of their bargain.

Moncharsh v. Heily & Blase, 3 Cal. 4th 1, 10, 832 P.2d 899, 903, 10 Cal. Rptr. 2d 183, 187 (1992).

Section 10 of the Act does not require de novo review in cases such as this. *See* 9 U.S.C. § 10. An independent judicial evaluation is neither warranted nor appropriate when the parties agree that matters concerning the extent of an arbitrator's obligation to disclose circumstances likely to effect impartiality, and whether an arbitrator should be disqualified, are to be decided conclusively by an arbitrating body, in this case the AAA.[6]

Britz and Alfa-Laval contractually agreed that any decision rendered by the AAA concerning the arbitrator's disclosure duties shall be conclusive. AAA Rule 19. Like the *First Options* parties who contracted to preclude a court from making a de novo review under Section 10(4) of the Act concerning whether arbitrators exceeded their

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[6] This case is distinguished from those in which a party alleges nondisclosure, evident partiality, or bias, but did not contractually submit the issue to an extra-judicial tribunal for conclusive resolution. *See Commonwealth Coatings Corp. v. Continental Cas. Co.*, 393 U.S. 145 (1968), *reh'g denied*, 393 U.S. 1112 (1969); *Schmitz v. Zilveti*, 20 F.3d 1043 (9th Cir. 1994) (arbitration under the National Association of Securities Dealers which does not have provision for conclusive decision by tribunal on issues of bias and disqualification).

powers when determining arbitrability, the parties here contractually precluded de novo review under Section 10(2) concerning whether the arbitrator was evidently partial. They agreed that the AAA, rather than the court, would decide that issue conclusively. The court must defer to the AAA's decision unless the AAA itself was biased.[7] Any other rule of law injects a new layer of litigation into a process where the parties obviously intended to eliminate litigation, confounding the object of arbitration and effectively denying the parties the benefit of their bargain.

C. De Novo Review of an Arbitrating Body's Decisions Which the Parties Agree Are Conclusive Is an Egregious Example of the Jurisdictional Jealousy of Arbitration That the Act Was Enacted To Eradicate.

Congress enacted the Federal Arbitration Act to combat the kind of aggression toward arbitration evidenced by the court of appeal's refusal to enforce the parties' agreement to allow the AAA to decide conclusively the issue of disqualification. *See Aerojet-General Corp. v. American Arbitration Ass'n*, 478 F.2d 248, 252 n.5 (9th Cir. 1973). The Act helps parties to overcome courts' refusals to enforce agreements to arbitrate. *Allied-Bruce Terminix Cos. v. Dobson*, 115 S. Ct. 834, 838 (1995) (citation omitted). The *Allied-Bruce* Court commented:

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[7] There has been no allegation that the AAA, the body that addressed the arbitrator's nondisclosure and decided not to disqualify him, was evidently partial or outright biased, or that the AAA committed any wrong at all. The appellate court even noted: "This is a non-disclosure case. It is not a case in which actual bias is alleged." *Britz, Inc. v. Alfa-Laval Food & Dairy Co.*, 34 Cal. App. 4th 1085, 1103, 40 Cal. Rptr. 2d 700, 711 (Cal. Ct. App. 1995).

> The origins of these refusals apparently lie in "ancient times," when the English courts fought "for extension of jurisdiction—all of them being opposed to anything that would altogether deprive every one of them of jurisdiction." *Bernhardt v. Polygraphic Company of America, Inc.*, 350 U.S. 198, 211 n.5 (1956) (Frankfurter, J., concurring). . . . American courts initially followed English practice, perhaps just "standing . . . upon the antiquity of the rule" prohibiting arbitration clause enforcement, rather than "upon its excellence or reason." *Bernhardt v. Polygraphic Co., supra*, 350 U.S. at 211 n.5. . . . Regardless, when Congress passed the Arbitration Act in 1925, it was "motivated, first and foremost, by a . . . desire" to change this arbitration rule. *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 220 (1985). It intended courts to "enforce [arbitration] agreements into which parties had entered," *ibid.* (footnote omitted), and "to place such agreements under the same footing as other contracts," *Volt Information Sciences, Inc., supra*, 489 U.S. at 474.

Id. at 838 (some internal quotation marks and parallel citations omitted). Among the reasons for these rules of English law is

> the jealousy of their rights as courts, coupled with the fear that if arbitration agreements were to prevail and be enforced, the courts would be ousted of much of their jurisdiction. . . . [It is] not unreasonable to suppose that a desire to retain, if not to extend, the jurisdiction had much to do with inspiring the fear that arbitration tribunals could not do justice between the parties.

S. Rep. No. 536, 68th Cong., 1st Sess. 2-3 (1924); *see also* H.R. Rep. No. 96, 68th Cong., 1st Sess. 1-2 (1924); David Margolick, *Chief Justice Proposes Arbitration To Stem "Avalanche" of Lawsuits*, N.Y. Times, Jan. 25, 1982, at A19 (In a speech to the American Bar Association, Chief

Justice Warren E. Burger "said that arbitration has been opposed by judges jealous of jurisdiction and lawyers fearful of losing business.").

The court's jurisdictional jealousy arises from a distrust of an arbitrator's abilities and a paternalistic belief that the contracting parties do not really know what is good for them. Such undercurrents of jurisdictional jealousy can be seen in the dissents of the decisions that bolster judicial respect for parties' agreements to arbitrate. *See, e.g., Moncharsh v. Heily & Blase*, 3 Cal. 4th 1, 9, 832 P.2d 899, 10 Cal. Rptr. 2d 183, 186 (1992) (Kennard, J., dissenting) ("The exercise of judicial power cannot be controlled or compelled by private agreement or stipulation."). This paternalism elevates governmental supervision over individual choice. Such indulgence in governmental supervision for its own sake ignores that "the basic rights of the individual are not created by the state, but are only protected by it." Ladd, "Introduction" to *I. Kant, The Metaphysical Elements of Justice*, xxii (J. Ladd trans. 1965). The Act precludes courts from invoking distrust of arbitration or a claim to exclusive jurisdiction to vitiate parties' contracts to arbitrate. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (age discrimination claim was subject to compulsory arbitration pursuant to arbitration agreement in securities registration application); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (ruling that the judiciary's interest in controlling the adjudication of antitrust claims did not outweigh the importance of effecting the parties' intent to arbitrate that issue: "the fundamental importance to American democratic capitalism of the regime of antitrust law . . . does not compel the conclusion that the treble damages remedy may not be sought outside an American court").

The court of appeal's suspicion of the AAA's financial interest provides a classic example of why Congress passed the Act to preserve the sanctity of arbitration. *See Britz, Inc. v. Alfa-Laval Food & Dairy Co.*, 34 Cal. App. 4th 1085, 1102-03, 40 Cal. Rptr. 2d 700, 710 (Cal. Ct. App. 1995). The court of appeal's reasoning is flawed because like the AAA, the judiciary also has a vested interest in assuring cases in its jurisdiction are administered smoothly. If the parties have, by contract, set the rules for their fight, it is for the court to enforce the rules rather than strain for reasons to avoid them. The court below begged the question when it noted, "[w]e perceive that arbitrator bias is a fundamentally different question from venue." *Id.* at 1102, 40 Cal. Rptr. 2d at 710. In both circumstances, the AAA is the entity to which the parties committed the decisions, and there is no basis for singling out the AAA's decision whether to disqualify an arbitrator. The court of appeal's judgment must derive from inappropriate jurisdictional jealously.[8]

In the end, accepting Britz's, or others', attack on conclusively decided arbitration issues will "scuttle the spirit of deference that courts have always used in reviewing arbitral awards." *Remmey v. PaineWebber, Inc.*, 32 F.3d 143, 145 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 903 (1995). Indeed, "[l]imited judicial review is necessary to encourage the use of arbitration as an alternative to formal litigation." *Id.* at 146. To hold otherwise is to succumb to the precise jurisdictional jealousies against which the Act was designed to protect.

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[8] Given its vast experience with these issues, the AAA is, in fact, specially equipped to make judgments concerning nondisclosure and disqualification.

II.

DE NOVO REVIEW OF AN ARBITRATING BODY'S CONCLUSIVE DECISION DISTURBS THOUSANDS OF CONTRACTUAL RELATIONSHIPS WHICH DEPEND ON RESOLVING DISPUTES THROUGH EFFICIENT AND CERTAIN ARBITRATION.

De novo judicial review of conclusive decisions by the AAA casts doubt into thousands of business and other contractual relationships which depend on resolving disputes through arbitration. For the parties to these agreements, arbitration represents a quick, cost effective, and certain alternative to litigation in the courts. When courts fail to enforce parties' contractual provisions for arbitration, whether up front or through de novo review of arbitration decisions, parties lose confidence in the certainty of their agreements and in arbitration itself. In the present case, the parties contractually agreed to resolve their disputes outside the courts. Instead, the parties have endured protracted litigation. This Court should now alleviate the uneven interpretation of the law which plagues this area of great public importance, so parties can obtain the quick, cost effective, and certain results for which they contract. For the same reason, the Court should grant a writ of certiorari because this case raises important and pervasive issues concerning the administration of the Federal Arbitration Act. *See United States v. Ruzicka*, 329 U.S. 287, 288 (1946).

Although parties may seek judicial review of an award if the arbitrator's corruption or evident partiality is alleged, thousands of parties agree to avoid the specter of protracted and costly litigation by authorizing independent tribunals like the AAA to decide conclusively whether to disqualify an arbitrator. Thousands of these contracts contain provisions incorporating the AAA Commercial Arbitration Rules authorizing the AAA to decide conclusively

whether to disqualify an arbitrator following a party's objection. American Arbitration Association, *1994 Statistical Report* (1995). Each year, thousands of parties ask the AAA to administer their arbitrations; each can reasonably expect the AAA to decide conclusively whether arbitrators should be disqualified.

To realize their desired certainty, cost savings, and time efficiency, the parties must be guaranteed finality:

> The policy of the law in recognizing arbitration agreements and in providing by statute for their enforcement is to encourage persons who wish to avoid delays incident to a civil action to obtain an adjustment of their differences by a tribunal of their own choosing. (*Utah Constr. Co. v. Western Pac. Ry. Co.* (1916), 174 Cal. 156, 159, 162 P. 631.) "Typically, those who enter into arbitration agreements expect that their dispute will be resolved without necessity for any contact with the courts." (*Blanton v. Womancare, Inc.* [(1985), 38 Cal. 3d 396,] 402, fn. 5, 212 Cal. Rptr. 151, 696 P.2d 645.)

Moncharsh v. Heily & Blase, 3 Cal. 4th 1, 9, 832 P.2d 899, 903, 10 Cal. Rptr. 2d 183, 187 (1992). "This expectation of finality strongly informs the parties' choice of an arbitral forum over a judicial one." *Id.* at 10, 10 Cal. Rptr. 2d at 903, 832 P.2d at 187. The Act requires courts to enforce parties' intentions to avoid costly and time-consuming litigation:

> It is particularly appropriate that the action should be taken at this time when there is so much agitation against the costliness and delays of litigation. These matters can be largely eliminated by agreements for arbitration, if arbitration agreements are made valid and enforceable.

H.R. Rep. No. 96, 68th Cong., 1st Sess. 2 (Jan. 24, 1924).

A court's de novo review of conclusive decisions by an independent tribunal violates the Act's purpose of enforcing parties' intentions to settle their disputes in this relatively quick and inexpensive manner. As one court stated:

> A policy favoring arbitration would mean little, of course, if arbitration were merely the prologue to prolonged litigation. If such were the case, one would hardly achieve the "twin goals of arbitration, namely, settling disputes efficiently and avoiding long and expensive litigation." . . . Opening up arbitral awards to myriad legal challenges would eventually reduce arbitral proceedings to the status of preliminary hearings. Parties would cease to utilize a process that no longer had finality. To avoid this result, courts have resisted temptations to redo arbitral decisions.

Remmey v. PaineWebber, Inc., 32 F.3d 143, 146 (4th Cir. 1994) (citation omitted), *cert. denied*, 115 S. Ct. 903 (1995).[9] If courts may review de novo decisions of an arbitrating

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[9] The potential for a losing party's abuse of a liberal policy of review contributes to a lack of finality. A party may move to vacate an arbitration award simply as a tactical response to having lost the arbitration. Such a strategy increases the cost of resolving disputes and undermines the finality of arbitration, contrary to the parties' intentions and to the Act's purpose of making arbitration "a swift, inexpensive, and effective substitute for judicial dispute resolution." *Mertit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673, 683 (7th Cir.), *cert. denied*, 464 U.S. 1009 (1983). One court has noted:

> [P]ragmatic policy concerns support the hesitancy by courts to vacate awards on the basis of a failure of disclosure on the part of the arbitrators. The most obvious reason for this caution is the courts' concern that "a suspicious or disgruntled party can seize" upon an undisclosed relationship "as a pretext for invalidating the award."

Sanford Home for Adults v. Local 6, IFHP, 665 F. Supp. 312, 318 (S.D.N.Y. 1987).

body that the parties intended to be conclusive, parties lose the benefit of their bargains, and thousands of parties will lose confidence in the meaning of their contracts and the finality of arbitration. The Act lifts contracting parties out of such a quandary: a quandary exemplified by this case. Britz twice sought and twice received the AAA's conclusive ruling on the nondisclosure objection. Britz agreed in 1989 to be bound conclusively by the AAA's ruling on this issue. With its motion to vacate in the Superior Court, Britz sought to avoid the effects of its agreement to obey the AAA rules for arbitration. Although courts generally have frowned upon such efforts to take a "second bite at the apple" because of dissatisfaction with the outcome (*see, e.g., Remmey*, 32 F.2d at 146), the court below sanctioned Britz's conduct and sent the parties out to re-litigate a matter that should have been concluded long ago. The only rationale for this decision is the lower court's mistaken notion that a party's claim of impartiality automatically requires de novo review.

The court of appeal's ruling is the first to address directly whether a charge of bias automatically triggers de novo review. Yet, the court of appeal's de novo standard is so inconsistent with this Court's decisions that it will leave the purpose and meaning of the Act in a state of confusion and will lead to non-uniformity among courts. The uncertainty raised by different standards of review in different jurisdictions creates obstacles to conducting interstate business. Arguing to grant a petition for writ of certiorari in a similar case, Justice O'Connor, joined by the Chief Justice, commented on the need for uniformity in this area: "[t]he result is that courts in different jurisdictions reach contrary results . . . involving similarly situated parties and identical arbitration agreements. The Federal Arbitration Act was passed, in part, to prevent this kind of disarray." *J. Alexander Sec., Inc. v. Mendez*,

114 S. Ct. 2182, 2183 (1994) (O'Connor, J., dissenting). Businesses engaged in an interstate transaction must be able to rely on agreements to arbitrate to finality without undue interference from the judiciary.

This Court's word on judicial review of conclusive decisions by independent arbitrating bodies is important because the standard of review will affect businesses' decisions to arbitrate. There is a need for certainty in business transactions and relationships. As long as different courts use different standards of review, the right to enforce arbitration contracts and arbitration judgments will continue to depend "on the particular forum in which it is asserted." *Southland Corp. v. Keating*, 465 U.S. 1, 15 (1984). A ruling from this Court will put all courts and all arbitrating parties in a place of certainty on an issue affecting thousands of business and personal transactions within and across the United States.

CONCLUSION

For the foregoing reasons, petitioners respectfully request that this petition for a writ of certiorari be granted.

Respectfully submitted,

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